United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 10, 2005

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Petroleum Heat & Power Co.
d/b/a Petro
Case 1-CA-42162

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This Section 8(a)(2) and (5) case was submitted for advice as to whether the Employer lawfully withdrew recognition from the Union, which represented employees at one of its three facilities, and accreted those employees into a unit covering two other facilities represented by another union, on the ground that the Employer consolidated the three facilities and created a new operation that eliminated the single facility as a separate appropriate bargaining unit.

We conclude that the Employer did not lawfully accrete the single facility unit because the Employer's alleged consolidation merely transferred some employees and changed their work assignments, and did not create a new operation eliminating the single-facility unit. The Employer thus violated Section 8(a)(5) when it withdrew recognition from the Union in the single-facility unit and unilaterally changed the unit employees' conditions of employment, and also violated Section 8(a)(2) when it accreted the single-facility unit employees into a multi-facility unit covered by a different collective-bargaining agreement.[1]

FACTS

Petroleum Heat & Power Co. d/b/a Petro (Employer) is a home heating oil provider that operates three facilities in greater Boston, Massachusetts. Teamsters Local 49 (Local 49

[1] The Injunction Litigation Branch will address the propriety of Section 10(j) relief in a separate memorandum.

or the Union) represented the Employer's Lawrence facility workforce in a single-facility unit. Teamsters Local 25 (Local 25) represented the Employer's Chelsea and Westwood employees in a two-facility unit.

The Lawrence unit was comprised of five oil truck drivers, six service technicians, and one mechanic. The Chelsea/Westwood unit was comprised of 22 oil truck drivers, 64 service technicians, and four mechanics. In each bargaining unit, oil truck drivers reported to their respective facilities each day to pick up route assignments. Service technicians were dispatched from their homes and reported to their respective facilities only about once a week to pick up parts and supplies. Lawrence unit employees served a geographic area consisting of the city of Lawrence and nine neighboring communities (the Lawrence zone). Chelsea/Westwood unit employees served a much larger area of eastern Massachusetts (the Chelsea zone). Consistent with the two unions' geographic jurisdiction, the oil truck drivers and service technicians in both Lawrence and Chelsea/Westwood worked exclusively in their own geographic zones and did not perform work in the other unit zone. The mechanics in each unit similarly only maintained the vehicles that served their respective zones.

On March 22, 2004,[2] Local 49 gave the Employer timely written notice that it desired to negotiate a successor agreement to the parties' contract, set to expire May 31. On May 24, the Employer informed Local 49 that it intended to close Lawrence effective September 1.[3] The parties met to bargain over the effects of closing Lawrence.[4] On June 24, the parties agreed to extend the Local 49 contract up to the September 1 closing date.

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[2] All dates are 2004 unless otherwise indicated.

[3] According to the Employer, this decision arose from considerable operational inefficiencies caused by the Local 25/Local 49 geographic zones. For example, the Employer could not dispatch a nearby Local 49 employee to an oil delivery or service call in a town abutting one of the 10 Lawrence zone communities, because that town was within Local 25's zone. In addition, the Employer contends that the lone Lawrence mechanic was significantly underutilized because he maintained only the 14 Lawrence vehicles, a number well below the Employer's productivity standard of at least 21 vehicles.

[4] During these negotiations, the Employer told the Union that it intended to relocate the Lawrence employees to Woburn, Massachusetts, which is in the Local 25 zone.

The Employer never closed the Lawrence facility. Instead, on September 1 the Employer reassigned four full-time oil truck drivers and eight service technicians from the Chelsea/Westwood unit to work at Lawrence. The Employer also began assigning work to all oil truck drivers, service technicians, and mechanics without regard to the Local 25/Local 49 geographic zones.[5] Moreover, the Employer began applying the Local 25 contract to the Lawrence facility and dovetailed the Local 25 and Local 49 seniority lists.

Both before and after the transfer of employees, the Employer's New England Region Zone Director and Boston District General Manager was Joseph DeRosa, who worked out of Chelsea. Both before and after the transfer of employees, a delivery manager and two field service managers oversaw the work in Chelsea, and an oil delivery on-road manager, a delivery on-road service manager, and two field service managers oversaw the work in Westwood. Prior to the transfer of employees, Gary Nadeau had served as the Lawrence Depot Manager, supervising the Lawrence oil truck driv ers and service technicians. After the transfer, the Employer promoted Nadeau to Boston District Service Manager, but the Lawrence employees apparently continued to work under his supervision, and the seven Chelsea and Westwood service managers began reporting to him at Lawrence instead of to DeRosa at Chelsea.

Sometime after September 1, Local 49 President Bernard Tyler drove past the Lawrence facility and noticed the Employer's trucks were still parked outside. Tyler spoke to a number of employees who confirmed that the Employer had never closed the facility.

On September 23, Tyler wrote the Employer claiming that Local 49 retained jurisdiction over Lawrence, requesting that the Employer remit all Union dues to Local 49, and demanding that the Employer negotiate a new contract with Local 49. The Employer replied that it had consolidated its Lawrence and Chelsea/Westwood operations, and that because Local 25 represented a considerable majority of the total employee complement, Local 25 alone survived as their collective-bargaining representative.

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[5] In this regard, the Employer produced records showing that since September 1, its Lawrence service technicians (including the Chelsea transferees) have performed between 44% and 63% of their work outside of the Lawrence zone.

ACTION

We conclude that the Employer unlawfully accreted the Lawrence facility into the Chelsea/Westwood unit because the Employer's consolidation merely transferred some employees and changed their work assignments and did not eliminate the Lawrence facility as a separate appropriate unit.

The Board follows a restrictive policy in applying the accretion doctrine because accreted employees are placed into a bargaining unit without an election or other showing of majority status.[6] Accordingly, the Board will permit an accretion "only where the employees sought to be added … have little or no separate identity and share an overwhelming community of interest with the preexisting unit …"[7] In determining whether an overwhelming community of interest exists, the two factors of employee interchange and common day-to-day supervision are "especially important."[8] In particular, when an employer claims that an accretion arose from a merger or consolidation of two units of employees which had been represented by different unions, the Board will find a lawful accretion only if (1) the combined unit is the sole appropriate unit; and (2) one unit of employees is sufficiently predominant in numbers to remove the question concerning overall representation.[9] The first factor, which requires the combined unit to be the sole appropriate unit, necessarily is not met if the merger/consolidation does not eliminate one of the units as a separate, identifiable unit.

We conclude that the Employer did not lawfully accrete the Lawrence unit employees because (1) the Employer's change in its Lawrence and Chelsea/Westwood operations did not eliminate the Lawrence employee complement as a single appropriate unit; and (2) the Lawrence and Chelsea/Westwood

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[6] See, e.g., Frontier Telephone of Rochester, Inc., 344 NLRB No. 153, sl. op. at 2 (2005).

[7] E.I. Dupont DeNemours, Inc., 341 NLRB No. 82, sl. op. at 2, quoting Ready Mix USA, Inc., 340 NLRB No. 107, sl. op. at 9 (2003).

[8] Towne Ford Sales, 270 NLRB 311, 311-12 (1984); Super Valu Stores, 283 NLRB 134, 136 (1987). "[T]he absence of these two factors will ordinarily defeat a claim of lawful accretion." Frontier Telephone, supra, sl. op. at 2, n.7.

[9] Martin Marietta Co., 270 NLRB 821, 822 (1984); Boston Gas Co., 221 NLRB 628, 629 (1978).

employees continued separate supervision with no interchange, clearly lacking an overwhelming community of interest.

Contrary to its original plan, the Employer did not sell its Lawrence facility and, except for expanding the geographic areas in which employees work, it continues to operate out of the pre-September 1 facilities exactly as it always had. The Employer thus did not create a "new operation" eliminating the Lawrence facility; the Lawrence Local 49 bargaining unit remains separate, identifiable, and appropriate at all relevant times.[10]

Martin Marietta,[11] upon which the Employer specifically relies in support of its position, is clearly distinguishable. The employer in Martin Marietta quarried and manufactured lime products at one plant and then purchased an immediately adjacent lime quarry and manufacturing plant from another company. The employer hired that company's employees and physically connected the formerly separate quarries permitting free access by all employees. The employer also brought the adjacent plants under a single general manager, personnel manager, and safety engineer, as well as under a single traffic manager who handled shipments from both plants. The Board found a lawful accretion because this new operation "obliterated the previous separate identities of the two units" and that "one overall unit . . . is now the sole appropriate unit."[12]

In contrast, the Employer here continued to maintain Lawrence as a separate facility. Lawrence drivers, technicians, and mechanics continued to work under their local supervision and management, as did the

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[10] See Children's Hospital, 312 NLRB 920, 923, 928-29 (1993), enfd. 87 F.3d 304 (9th Cir. 1996) (employer unlawfully withdrew recognition from union where, despite merger and administrative consolidation and standardization of two hospitals, historical single facility bargaining unit remained appropriate).

[11] 270 NLRB 821 (lawful accretion where employer physically connected two separate facilities, placed them under common management and control, and thereby created a "new operation" that eliminated two units previously represented by different unions).

[12] Id. at 822. The Board ordered an election because neither union predominated sufficiently to remove the question concerning representation created by the elimination of the previous separate units.

Chelsea/Westwood employees.[13] The Employer transferred some Chelsea/Westwood employees to Lawrence and expanded all employees' work assignments to a larger geographic area (i.e., both the Lawrence and Chelsea zones). However, as discussed below, there is no evidence that the Lawrence employees otherwise interchanged with the employees in the Chelsea/Westwood facilities. Rather, the newly enlarged number of Lawrence employees continued to operate as a separate workforce. Thus, the Employer's consolidation merely transferred some Chelsea/Westwood employees and work areas into the Lawrence unit, while the Lawrence facility continued to operate as a separate, identifiable facility.

In these circumstances, we conclude, in agreement with the Region, that the Employer did not create a "new operation" obliterating the previous Lawrence unit. Unlike in Martin Marietta, the Lawrence Local 49 bargaining unit has remained separate, identifiable, and appropriate at all relevant times.[14] We therefore conclude that the Employer unlawfully withdrew recognition from Local 49 and applied the Local 25 contract to the Lawrence facility.

The Employer's transfer also failed as a lawful accretion because the Lawrence and Chelsea/Westwood employees continue to lack an overwhelming community of interest. The two factors of "critical importance" in finding a lawful accretion are absent here. First, as in the past, there is no interchange between employees stationed in Lawrence and those stationed in Chelsea or Westwood, since they all continue to make their delivery or service calls from their homes or after reporting to their respective facilities.[15] Second, there is no common day-to-

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[13] Although the Chelsea/Westwood managers also began reporting to Nadeau, they continued as local management in their respective facilities. Thus, while labor relations control may have become more centralized and streamlined, day-to-day supervision remained unchanged, as in Frontier Telephone, above, slip op. at 3.

[14] See Children's Hospital, 312 NLRB 920 (1993), enfd. 87 F.3d 304 (9th Cir. 1996) (employer unlawfully withdrew recognition from union where, despite merger and administrative consolidation and standardization of two hospitals, historical single facility bargaining unit remained appropriate).

[15] The one-time transfer of 12 Chelsea drivers or service technicians to Lawrence does not constitute "interchange" for purposes of determining accretions. See Frontier Telephone, above, 344 NLRB No. 153, sl. op. at 3, discussing

day supervision of the Lawrence and the Chelsea/Westwood employees. Everyone stationed at Lawrence, including the 12 transferred employees, apparently continue to directly report to Nadeau while everyone stationed at Chelsea or Westwood still directly report to a number of supervisory personnel, who now report to Nadeau instead of DeRosa. In these circumstances, the Employer's September 1 changes could not constitute a lawful accretion of the Lawrence unit employees to the Chelsea/Westwood unit. Therefore, the Employer violated Section 8(a)(5) by withdrawing recognition from Local 49, and Section 8(a)(2) by applying the Local 25 contract to the Lawrence unit employees, pursuant to its unlawful accretion.[16]

Next, we conclude that because the Employer's bargaining obligation to Local 49 remains intact, the Employer unlawfully made unilateral changes to the Lawrence unit employees' terms and conditions of employment. Changing the manner in which work is assigned and increasing employee job duties are both mandatory bargaining subjects.[17] Since September 1, the Employer has assigned work to the Lawrence-based oil truck drivers and service technicians without regard to the Local 25/Local 49 geographic zones -- i.e., it has unilaterally required them to sometimes work outside the Lawrence zone. In addition, the Lawrence mechanic's workload has increased considerably since September 1 because the Employer now requires that he service additional vehicles from the former Chelsea zone. The Employer thus violated Section 8(a)(5) by instituting these changes at Lawrence without first providing the Union with notice and an opportunity to bargain over them.

The fact that the Employer's changes were designed to eliminate operational inefficiencies does not affect the above argument that the Employer was obligated to notify and bargain with the Union over these changes. In Holmes &

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the lesser significance of permanent vis-à-vis temporary transfers.

[16] See, e.g., Frontier Telephone, supra, slip op. at 6, finding a Section 8(a)(2) violation arising from the unlawful accretion in that case.

[17] See, e.g., Duke University, 315 NLRB 1291, 1291, 1298 (1995) (employer unlawfully unilaterally changed its drivers' route assignment procedures); and St. John's Hospital, 281 NLRB 1163, 1166, 1168 (1986), enfd. 825 F.2d 740 (3d Cir. 1987) (adding significant new job duties, previously performed by others, to the work of unit employees is a mandatory bargaining subject).

Narver,[18] the Board held that the employer unlawfully failed to bargain over its decision to combine jobs and reassign work, resulting in layoffs, in order to similarly streamline its inefficient operation. The Board found that the employer had not abandoned a line of business, ceased a contractual relationship with a particular customer, or made any other change in the scope and direction of its business.[19] The Board concluded that the employer's decisions were akin to others long regarded as aspects of the employer/employee relationship, and therefore clearly mandatory bargaining subjects.[20]

Here, as in Holmes & Narver, the Employer's unilateral changes at Lawrence did not arise from any material change in the scope and direction of its business or from any significant change to the Employer's work. To the contrary, as set forth above, the Employer merely streamlined its operation to increase efficiency by reassigning some employees and expanding the areas where they perform their work. Accordingly, the Employer's unilateral changes at Lawrence are matters over which it was obligated to bargain.

In sum, absent settlement, the Region should issue a complaint alleging a Section 8(a)(5) violation arising from the Employer's withdrawal of recognition from Local 49, the unilateral changes it implemented at Lawrence, and also a Section 8(a)(2) violation arising from the unlawful application of the Local 25 contract to all employees working at the Lawrence facility, pursuant to the unlawful accretion of Lawrence into the Chelsea/Westwood unit.

B.J.K.

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[18] 309 NLRB 146 (1992).

[19] Id. at 147. The Board noted that the Employer had failed to show any appreciable change to the work in issue.

[20] Ibid. (internal citations omitted).